IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 1228

HOWARD F. BISHOP,

Petitioner,

vs.

BANKERS BUILDING, INC.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I

The Opinions of the Courts Below

The opinion in the Appellate Court of Illinois is reported in *Bankers Building, Inc.* v. *Bishop*, 326 Ill. App. 256, but only in abstract form. The full opinion appears in the record herein at pages (R. 77 to 86), inclusive.

The order of the Illinois Supreme Court, denying a petition for leave to appeal from said Appellate Court judgment, appears on page 2 of the record herein. The order of January 15, 1946, of the Illinois Supreme Court, dis-

missing the writ of error subsequently sued out (after the filing of briefs and a consideration on the merits), appears on page 87 of the record. Netiehr of these two orders will appear in any of the official reports.

II

Jurisdiction

Petitioner contends that this Court has jurisdiction to review the judgment complained of herein, under section 237 (b) of the Judicial Code of the United States (28 U. S. C. A. sec. 344) on the ground that the action of the Appellate Court, as an agency of the State, violated the rights guaranteed to petitioner under the first section of the 14th Amendment to the Federal constitution. In the alternative, petitioner contends that section 17 of the Appellate Court Act of Illinois (1945 Ill. Rev. Stats., ch. 37, par. 41) is unconstitutional in that it is repugnant to the provisions of section 1 of the 14th Amendment because it is too vague and uncertain and permits the exercise of arbitrary and capricious power by the Appellate Courts of Illinois.

The foregoing questions, involving the jurisdiction of this Court, first arose upon the entry of the judgment of the Appellate Court. They were fully presented to the Illinois Supreme Court, as evidenced by the errors there assigned (R. 8-9). That court, by dismissing the writ of error, must be presumed to have decided the constitutional points herein contrary to petitioner's contention. The Federal questions involved herein were therefore necessarily passed upon by that court. The Federal questions are fairly presented by the record and the decision of the Illinois Supreme Court was necessary for a determination of the case.

III

Statement of the Case

A full statement of the case has been given under heading "A" in the Petition and in the interest of brevity, petitioner will not repeat it at this point.

IV

Specification of Errors

1. The Illinois Supreme Court erred in failing to hold that the Appellate Court and the trial court had no power or jurisdiction to refuse to permit petitioner to interpose his counterclaim as a defense in this cause.

2. The Illinois Supreme Court erred in failing to hold that the action of the Appellate Court and the trial court, in refusing to permit petitioner to interpose his counterclaim as a defense, abridged and violated petitioner's rights under section 1 of the 14th Amendment to the federal constitution.

3. The Illinois Supreme Court erred in failing to hold that the provisions of section 17 of the Appellate Court Act of Illinois (1945 Ill. Rev. Stats., ch. 37, par. 41) were repugnant to the requirements of section 1 of the 14th Amendment to the United States Constitution.

V

Summary of Argument

Point A. By failing to abide by the provisions of section 17 of the Appellate Court Act and thereby disregarding the mandate of the Illinois Legislature, the Appellate Court deprived petitioner of his rights under section 1 of the 14th Amendment to the Federal constitution.

Point B. In the alternative, said section 17 of the Appellate Court Act is repugnant to the provisions of the first section of the 14th Amendment to the United States Constitution.

VI

ARGUMENT

Point A

By Refusing to Permit Petitioner to Interpose His Counterclaim as a Defense in This Cause, the Appellate Court Deprived Him of His Rights under Section 1 of the 14th Amendment to the Federal Constitution.

As pointed out in the petition herein (statement of the case), judgment was confessed in this case, without a trial on the merits, upon three annual leases. Each of these leases had attached thereto, a rider calling for the payment of the rentals in legal services (R. 23-26). The counterclaim which petitioner sought to interpose as a defense, involved legal services rendered by petitioner to respondent under the terms of these riders, for which petitioner was entitled to credit upon the rentals claimed to be due and for which judgment was confessed. These services were clearly a part of the same transaction involved in this case. In denying petitioner a hearing and a trial on the question of the reasonable value of the services rendered and thereby refusing to offset the sum which would have been arrived at from the confession judgment herein, the Appellate Court violated petitioner's rights under the provisions of the first section to the 14th Amendment to the Federal constitution and Section 2 of Article II of the Illinois Constitution.

Prior to 1935, section 17 of the Illinois Appellate Court Act (1945 Ill. Rev. Stats., ch. 37, par. 41) provided as follows:

> "Sec. 17. All opinions or decisions of said (Appellate) court upon the final hearing of any cause, shall be reduced to writing by the court, briefly giving therein the reasons for such opinion or decision, and be filed in the cause in which rendered; *Provided,* that such opinion shall not be binding authority in any cause or proceeding, other than in that in which they may be filed."

In 1935, the legislature amended said section by eliminating the proviso thereto. The removal of the proviso was interpreted by the Appellate Court of Illinois, Third District, to mean that any ruling of any Division or any District of the Illinois Appellate Courts was now binding upon the other Divisions or Districts. In the case of *Hughes* v. *Medendorp,* 294 Ill. App. 424, the Third District held that under said section 17, as amended, it was bound by a ruling on a point of law in the earlier case of *In re Est. of Teehan,* 287 Ill. App. 58, stating (p. 427):

> "Since the amendment of sec. 41, ch. 37, Smith-Hurd Ann. St. 1935 (Ill. State Bar Stats. 1935, ch. 37, Par. 49; Jones Ill. Stats. Ann. 36.039), an opinion of the Appellate Court is binding authority, not only upon said court, but upon all inferior courts in this State."

The same view was held by the Circuit Court of Appeals, Seventh Circuit, in the case of *Commissioner of Int. Rev.* v. *Blair,* 83 F. (2d) 655 (1936), wherein the court stated (p. 657):

> "It may well be argued that the repeal of the provision making the decision binding only in the cause in which it is filed extended the scope and effect of the

> decisions of Illinois Appellate Courts. That would be our view of its effect."

Petitioner submits that the repeal of the proviso to section 17 therefore extended the scope and effect of the decisions of the Illinois Appellate Courts and, unless modified or overruled by the Illinois Supreme Court, or by this Court, makes such decisions binding upon all courts of equal or inferior jurisdiction.

On May 1, 1944, the First Division of the First District Appellate Court, in the case of *State Bank of Blue Island* v. *Kott,* 323 Ill. App. 27, clearly and expressly held that a counterclaim could be interposed as a defense in a confession case. On May 18, 1945, the Third Division of the same District rendered the decision complained of herein (*Bankers Building Inc.* v. *Bishop,* 326 Ill. App. 256), and ruled that a counterclaim could not be interposed in this confession case (R. 84-85), thereby depriving petitioner of an opportunity to present his defense.

The judgment of the Third Division of the First District Appellate Court in the case at bar is not only directly contrary to the ruling of the First Division of the same District Appellate Court, but it is in conflict with the principle announced by this Court in the case of *United States* v. *Ringgold,* 8 Pet. 150, wherein it was held (p. 163):

> "When an action is brought by the United States, to recover money in the hands of a party, who has a legal claim against them, it would be a very rigid principle, to deny to him the right of setting up such claim in a court of justice, and turn him round to an application to Congress. If the right of the party is fixed by the existing law, there can be no necessity for an application to Congress, except for the purpose of remedy. And no such necessity can exist, when the right can properly be set up by way of defence, to a suit by the United States."

The rule has been followed and adhered to consistently. See *United States* v. *U. S. Fidelity & Guar. Co.*, 309 U. S. 506, 511, and *Bull* v. *United States*, 295 U. S. 247, wherein the court said that "* * * a defendant may, without statutory authority, recoup on a counterclaim an amount equal to the principal claim."

By holding that petitioner could not interpose a counterclaim for legal services rendered under the provisions of the leases confessed upon herein and thereby refusing to follow and adhere to the rule previously established by the First Division, the Third Division of the First District Appellate Court violated the mandate of the Illinois Legislature, as expressed in section 17 of the Appellate Court Act, and deprived petitioner of due process of law and the equal protection of the law, as guaranteed by the first section of the 14th Amendment to the federal constitution and section 2 of Article II of the Illinois Constitution.

In the case of *C. B. & Q Ry.* v. *Chicago*, 166 U. S. 226, this Court held (pp. 233-235):

> "The prohibitions of the (14th) Amendment refer to all the instrumentalities of the state, to its legislative, executive, and judicial authorities, and, therefore, whoever by virtue of public position under a state government deprives another of any right protected by that Amendment against deprivation by the state, 'violates the constitutional inhibition; and as he acts in the name and for the state, and is clothed with the state's power, his act is that of the state.' This must be so, or, as we have often said, the constitutional prohibition has no meaning, and 'the state has clothed one of its agents with power to annul or evade it'. * * * a state may not, by any of its agencies, disregard the prohibitions of the 14th Amendment. Its judicial authorities may keep within the letter of the statute prescribing forms of procedure in the courts and give the parties interested the fullest opportunity to be heard, and yet it might be that its final action

> would be inconsistent with that Amendment. In determining what is due process of law regard must be had to substance, not to form."

Mr. Chief Justice Marshall, speaking for the court in the case of *Osborne* v. *The Bank of the U. S.*, 9 Wheat. 738, said (p. 773):

> "Judicial power, as contradistinguished from the power of the laws, has no existence. Courts are the mere instruments of the law, and can will nothing. When they are said to exercise a discretion, it is a mere legal discretion, a discretion to be exercised in discerning the course prescribed by law; and, when that is discerned, it is the duty of the court to follow it. Judicial power is never exercised for the purpose of giving effect to the will of the judge; always for the purpose of giving effect to the will of the legislature; or, in other words, to the will of the law."

In the case of *Sunday Lake Iron Co.* v. *Wakefield*, 247 U. S. 350, it was stated (p. 352):

> "The purpose of the equal protection clause of the 14th Amendment is to secure every person within the state's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents."

"The clause of the Fourteenth Amendment forbidding a State to deny to any person within its jurisdiction the equal protection of the laws is a pledge of the protection of equal laws". *Power Co.* v. *Saunders*, 274 U. S. 490, 493; *Truax* v. *Corrigan*, 257 U. S. 312, 333.

POINT B

In the Alternative, Section 17 of the Illinois Appellate Court Act Is Unconstitutional

If the Appellate Court in this case was not bound by the decision rendered in the *Kott* case and had the power and jurisdiction to hold that petitioner could not interpose a counterclaim as a defense herein, then section 17 of the Appellate Court Act contravenes the due process and equal protection provisions of the Federal and State constitutions. If the Act permits the various Appellate Courts of this state to disregard the principles of law established by the decisions of such courts, then the Act is unconstitutional in that it vests in such courts a power which may be arbitrarily and capriciously exercised. "The States cannot, in the exercise of control over local laws and practice, vest State courts with power to violate the supreme law of the land." *Kalb* v. *Feuerstein,* 308 U. S. 433, 439.

Mr. Chief Justice Taft, speaking for the Court in the case of *Truax* v. *Corrigan,* 257 U. S. 312, said (p. 329, 330):

> "• • • the legislative power of a State can only be exerted in subordination to the fundamental principles of right and justice which the guaranty of due process in the Fourteenth Amendment is intended to preserve, and a purely arbitrary or capricious exercise of that power whereby a wrongful and highly injurious invasion of property rights, as here, is practically sanctioned and the owner stripped of all real remedy, is wholly at variance with those principles."

On page 332, he stated further:

> "The due process clause requires that every man shall have the protection of his day in court, and the benefit of the general law, a law which hears before it condemns, which proceeds not arbitrarily or capriciously

> but upon inquiry, * * *. Our whole system of law is predicated on the general, fundamental principle of equality of application of the law. 'All men are equal before the law,' 'This is a government of laws and not of men,' 'No man is above the law' are all maxims showing the spirit in which legislatures, executives and courts are expected to make, execute and apply laws."

In the case of *United States* v. *Cohen Grocery Co.*, 255 U. S. 81, it was held (p. 87):

> "Because the law is vague, indefinite, and uncertain, and because it fixes no immutable standard of guilt, but leaves such standard to the variant views of the different courts and juries which may be called on to enforce it * * * it is constitutionally invalid."

Conclusion

It is, therefore, respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers, in order that justice may prevail and that petitioner may avail himself of the rights and privileges guaranteed him under the foregoing constitutional provisions, and that to such an end a writ of certiorari should be granted and this Court should review the decision complained of and finally reverse it.

Respectfully submitted,

HOWARD F. BISHOP,
Counsel for Petitioner, Pro se.